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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 53

CLIFFORD M. DAVIS,
Petitioner,

v.

VIRGINIAN RAILWAY COMPANY,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED

Respondent denies that Petitioner's statement of the questions presented on this review (Petitioner's Brief p. 2) is accurate. At the conclusion of Petitioner's evidence, the Circuit Court of the City of Norfolk sustained Respondent's motion to strike said evidence and accordingly entered summary judgment for Respondent in accordance with prescribed procedures in this State. The Supreme Court of Appeals of Virginia denied a petition for writ of error. The questions for review are:

I. Was the evidence of Petitioner sufficient to support, with reason, a jury finding of employer negligence and

causal connection where it established: (a) that he, an experienced brakeman and freight conductor, simply slipped and fell from a perfectly sound ladder on a box car from which he was descending in a normal position where his only suggestion of the cause of his fall was that there might have been grease on his shoe; and (b) that the surface of the right of way was not such as would prevent an injury to persons falling from cars?

II. (a) Under the evidence in this action is Respondent, by reason of the Act, liable for alleged negligence of a physician in his medical treatment of an employee where the physician is a private practitioner, not engaged in any operational activities of the railroad and by all other standards the classical example of a true independent contractor?

(b) Where the evidence simply disclosed a difference in personal opinion between two doctors as to the better manner of treatment of a particular injury, was a jury issue in this action thereby made out on a claim of alleged malpractice?

STATEMENT OF THE CASE

Evidence of Cause of Petitioner's Injury:

Petitioner is a freight conductor for respondent company. Only July 3, 1957, while in charge of a switching operation, he attempted to descend from the top of a box car and slipped from one of the top rungs on the ladder and fell about fifteen feet to the ground and injured his foot. (R. 14, 18). It was a clear summer day at about 11:00 A. M. o'clock. There was no engine coupled to these cars at the time and they were barely moving if at all. Petitioner testified that the car was moving so slowly when he fell from the ladder that it was stopped when he landed on the ground. (R. 26-27).

There was no evidence as to what caused Petitioner to fall. Petitioner's Bill of Particulars states that:

(R. 3)

> "plaintiff is unable to state whether or not the rungs of the freight car from which his foot slipped contained grease or were bent so as to contribute to the plaintiff's fall."

His testimony was as follows:

(R. 13-14)

> "Q. What happened to you as you went down this car?
>
> A. Well, I slipped, my feet slid out from under me and I —
>
> Q. Where were you when that happened? Were you on the ladder or where?
>
> A. I was starting down the ladder.
>
> Q. What rung were your feet on, would you estimate? How far down the ladder had you gotten?
>
> A. I would say the second or third rung."
>
> • • • •
>
> By the Court:

(R. 18)

> "Q. Before counsel for the defendant cross examines, the Court would like to know something about this. You came down a metal ladder, iron ladder or wooden ladder?
>
> A. Metal ladder.
>
> Q. You say you put your feet on the second round from the top?
>
> A. Yes.
>
> Q. How far was that from the ground?
>
> A. That was fifteen, ten or fifteen feet.

Q. When you put your feet on the second round what did you do with your hands, if anything?

A. I had my hands on the top round.

Q. When your feet slipped off, according to your testimony, the second round —

A. A-hum.

Q. — did you turn loose from the hold you had on the ladder with your hands?

A. Pulled loose.

Q. What caused you to fall off that ladder?

A. It is — it might have been grease or anything on my shoe.

Q. It might have been; you don't know what caused it?

A. It is what — something caused slip out from my foot."

Evidence Descriptive of Operation Being Conducted:

The box car from which Petitioner fell was one of fourteen that under his direction had been placed on a siding which led into the interior of the plant of the Ford Company in Norfolk and was called the "house track". The cars were thus between the main tracks and the assembly plant. The operation under way consisted of the removal of a train of empty cars from the interior of the plant and its replacement with a train of loaded cars in pre-designated sequence. The removal of the empties and the assembly of the loaded cars in proper order on the house track preliminary to entering the plant constituted the first phase of the operation and consisted only of normal, ordinary switching and coupling. (R. 57). Petitioner's fall occurred during this phase. The second phase, was the entering of the plant and placing or "spotting" of the loaded cars at particular points within the plant. This phase was not

ready to be commenced at the time of Petitioner's fall, there still being an additional eight loaded cars to be brought onto the house track and coupled. (R. 23).

Evidence Relating to Claim of Time Limit for Job:

Petitioner's statement of the case suggests that he "was moving so rapidly that he was unable to take proper safeguards for his safety", thus causing his fall. Support for this conclusion of counsel is not found in the record. Here Petitioner *walked* along the tops of the cars until he came to the gondola and had to climb down. (R. 13). He then started down the ladder. (R. 14). He put his feet on the second round from the top and his hands on the top round. (R. 18). He was about fifteen feet above the ground (R. 18), and was in a normal, customary position for using the ladder. (R. 19). Then his feet slipped off the rung (R. 13-14) causing his hands to pull loose (R. 18), and he fell. His answer to the direct question as to what caused him to fall off the ladder was that "it might have been grease or anything on my shoe". (R. 18). There was no evidence that Petitioner was moving rapidly or that this contributed to his fall.

The subject of speed is therefore unrelated to Petitioner's injury. Petitioner in his brief, nevertheless, ignoring this hiatus in his evidence, has stated as a fact his conclusion that Petitioner was moving at an unsafe rate of speed and has dealt with evidence pertaining to his reasons for allegedly doing so. His theory is that he was negligently required by Respondent to abandon safety measures for the sake of speed. On the point thus urged by Petitioner, the following evidence is recited although it is admittedly irrelavent to any material issue in this case.

Petitioner as conductor was performing this operation

with the assistance of two brakeman, an engineer and fireman, all of whom were subject to his orders. (R. 23). This was exactly in accordance with past practice. (R. 34, 61). Petitioner was the senior man present and direct the operation. (R. 23). The pace at which the operation was carried out was wholly within his control. (R. 23, 36, 55). Directions attending the operation had in the past been to perform the job during the lunch hour of the Ford employees which lasted thirty minutes. (R. 53). Petitioner also was so instructed on the day he assumed regular work on this job slightly more than a month before his injury. (R. 20-21). However, the time required varied from day to day depending upon the day's switch order. (R. 53). Some switch orders could not physically be carried out during the lunch period, and past experience had been that sometimes the operation was completed within the lunch period and sometimes not. (R. 54, 56). When more time was consumed an explanatory report was filed, and overtime wages were paid. There was no penalty or disciplinary action. (R. 54). It was obvious from a simple examination of Petitioner's switch order for the day of the accident that it could not be completed in that time. (R. 54, 60). It was understood by the conductors in charge that they were never required to do any more than could be done within the bounds of safety. (R. 35). Such were their standing regulations which accompanied and qualified any specific instruction. It was their duty not to abandon any safety precautions for the sake of speed, and this was thoroughly understood by Petitioner as revealed by his testimony as follows: (R. 21-22)

> "Q. He did not tell you that you had to meet that schedule even if it meant for you to abandon safety precautions, did he?
>
> A. No, sir.

• • • •

Q. It is always your job, no matter what you are doing, to observe safety precautions for yourself and for your men, is it not?

A. Yes, sir.

Q. And when you are assigned to do a particular task, that assignment means you do that task while observing your safety precautions, does it not?

A. You have got to work as rapidly as you can and try to be safe while you are doing it.

Q. And try to be safe while you are doing it. And if you reach a point where it is necessary to abandon safety in order to do a certain thing by a certain time, you just have to go slower, don't you?

A. Yes, sir."

Evidence Relating to Claim of Brakemen's Inexperience:

Petitioner's Brief also urges that Respondent was negligent in having on the job a brakeman inexperienced in the second phase of the operation and that such negligence contributed to Petitioner's fall. However, each of the two brakemen had had a year's experience as such (R. 51, 61), and no suggestion is made that any lack of experience on their part in their duties being performed at the time of the accident contributed in any manner to Petitioner's fall. Nor is it suggested that Petitioner was assisting either brakeman in any respect at that time, nor that either brakeman did or failed to do anything which contributed to Petitioner's fall. In the light most favorable to Petitioner the most that can be said of the evidence, and indeed the only contention made (Petitioner's Brief, p. 6), is that it established that he was on top of the box car by reason of the senior brakeman's anticipated need of assist-

ance in the next phase of the operation. Petitioner chose this method of progressing to the point where he could be of assistance when necessary in the future, upon the commencement of the second phase of the operation which was the "spotting" of the loaded cars in the plant. Not until then was he going to assist the brakeman in any manner. (R. 25-26). The remarkable statement to the contrary made in his zeal by Petitioner's counsel (Petitioner's Brief p. 6) that after Petitioner had ascended the cars "one of the inexperienced brakemen then called to the Petitioner for assistance" is completely foreign to the record in this case. Petitioner's movements were pre-arranged between him and the brakeman Pennington (R. 12-13); there was no suggestion that anyone called for assistance; and the time when assistance was going to be needed had not yet arrived. (R. 26).

In addition Petitioner himself was experienced, and there was no evidence that his mere presence on top of the box car exposed him to any unreasonable risk of injury of any kind. He had been a brakeman from 1947 to 1951 and then "off and on" from 1951 to 1955, when he was made a conductor. During all that time, he climbed up and down box cars. His duties as conductor caused him to be on top of such cars at times, and he was thoroughly familiar with the ladders and grab irons. (R. 26).

Evidence Relating to Condition of Right of Way:

Petitioner landed on his feet on a sloping grassy bank along the side of the tracks. (R. 14, 52). The impact caused a fracture in the second metatarsal bone of the foot. While there was testimony that for the use of brakemen in getting on and off cars, the right of way should be smooth and level (R. 55), there was no suggestion of any type of surface which would have prevented injury to persons falling

from cars. On the contrary evidence introduced by Petitioner's medical expert disclosed that if the surface had been flat some fracture would have been probable (R. 30) and that the usual fracture that occurs in a straight fall of that height to a flat surface is one of the os calcis of the heel bone (R. 31, 32) which is a much more serious fracture than the metatarsal. (R. 32).

Evidence Relating to Claim of Liability for Physician's Alleged Negligence:

Subsequent to his injury Petitioner was treated by Dr. Southgate Leigh at Dr. Leigh's office. Dr. Leigh is a surgeon in private practice in the City of Norfolk who owns and maintains his own office and equipment. He is retained by the Respondent company for $125 per month to treat such of the injured employees of the company as may come to him. The employees of the railroad are not compelled to go to Dr. Leigh for treatment, but they have that privilege at no expense to themselves, if they so desire. (R. 7, 47). They select their own physician at their own expense if they wish, as Petitioner's conduct in the case at bar will attest. Company rules provide that "Employees injured on duty who select the services of physicians or surgeons other than as provided by the company must assume the expense thereof." (R. 51). The railroad does not deduct withholding tax or railroad retirement pay, does not furnish or control Dr. Leigh's office, equipment or staff, and exercises no control over him in the manner he treats his patients. (R. 8, 44-45).

Dr. Leigh strapped Petitioner's foot, X-rayed it, recommended that he use it rather than stay off his feet, advised against the use of crutches and did not recommend an arch support or supportive shoe, since he felt it was

better practice not to do so. (R. 38-41). He advised Respondent on about July 20, 1957 that he felt Petitioner could return to light work not involving climbing. (R. 39).

Sometime thereafter Petitioner returned to light work without returning to Dr. Leigh. Dr. Leigh saw him once more on August 22, 1957 which was about two weeks after Petitioner had placed himself in the regular care of his own physician, Dr. Thiemeyer. Petitioner had on August 7, 1957 engaged Dr. Thiemeyer and remained under his care until healed. This physician also had x-rays taken. He testified that in his opinion early ambulation on a fracture retards healing, that it prolongs the injury, that he would have recommended crutches and probably put Petitioner in a cast and subsequently did recommend the use of a steel reinforced shoe. (R. 29). About September 1, 1957. Petitioner returned to regular work.

The differences in personal opinions of these two doctors were not resolved. It was apparent that Dr. Leigh had treated Petitioner in accordance with a medical theory to which Dr. Thiemeyer did not subscribe, but there was no evidence that he was negligent in doing so. There was no medical evidence as to whether either doctor in adopting the theory to which he adhered would thereby have fallen below the standards of practice as established by the average competent physician practicing in like circumstances in this community.

ARGUMENT

At the outset, Respondent respectfully seeks to have it clearly understood that on this review it asks for no departure from the application of the Federal Employers' Liability Act in letter or spirit as that Act has been written by the Congress and construed by this Court. No such

departure has been sought by Respondent nor allowed to transpire by either of the very able courts which have heretofore dealt with the issues now presented to this Court. Aside from the question of Respondent's liability for acts of the physician, separately treated herein, the governing principles of law by which this action has been and must on this presentation be controlled have been clearly defined by this Court. They are:

> "Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death." *Webb v. Illinois Central Railroad Company*, 352 U. S. 512, 516 (1957).
>
> "Speculation cannot supply the place of proof." *Moore v. Chesapeake & Ohio Railway Co.*, 340 U. S. 573, 578 (1951).
>
> The issues may not properly be presented to the jury unless Petitioner has met the requirement "to present probative facts from which the negligence and the causal relation could reasonably be inferred." *Tennant v. Peoria & Pekin Union R. Co.*, 321 U. S. 29, 32, (1949).

The sole burden of this Court, therefore, is to review the facts established by Petitioner's evidence in this case, Respondent having introduced none. They have been set out with particularity in the foregoing Statement of the Case, and will not be repeated at length in this argument.

Established Cause of Petitioner's Injury:

Turning to a consideration of the conclusions which, with reason, may be drawn from such facts, it is notable at this point that the Petitioner's theories of liability do not

question the fact that the primary and moving cause of his injury was his fall from the box car which was caused by the slipping of his feet off the ladder. Petitioner has not suggested that any movement or condition of the box car or any act of Respondent or its employees hampered, disturbed or otherwise physically affected in any manner the freely executed attempted descent of Petitioner from the car. He has not questioned that the physical cause of the fall remains wholly unexplained beyond Petitioner's own suggestion that it might have been caused by grease on his shoe.

Confronted by this status of the evidence, Petitioner has elected to ignore the physical facts which his evidence established and to explore possible theories of liability based on remote and intangible factors which, he argues, combined to create an atmosphere consistent with the occurrence of some injury to someone on the job. He concludes, without more, that Petitioner was required to do his task in an "unsafe manner". The evidence is not sufficient to constitute a jury question under this Act where all the evidence shows that Petitioner fell because of the possibility of grease of his shoe, and if one does not believe this, then there was no evidence as to the cause of Petitioner's fall. *Moore v. Chesapeake & Ohio Railway Co.*, 340 U. S. 573 (1951).

Number and Qualifications of Fellow Employees:

Petitioner's theory of liability rests upon bits and pieces of the evidence wholly unrelated to his fall and opinions offered as a hopeful substitute for probative facts. That the number and qualifications of his brakemen had absolutely no direct relation to his fall is not questioned by Petitioner. His argument is solely that these matters caused him to be on the box car from which he subsequently fell.

(Petitioner's Brief p. 11-12). Petitioner thereby would have this Court hold that factors, which on a particular occasion cause a railroad employee to perform a task which is customary to his ordinary duties and which is no more hazardous on that particular occasion than on others, can, with reason, be regarded as causative of an injury suffered from an unexplained fall during the course of such task. The point is contrary to all logic and reason and has been conclusively determined against Petitioner in *Reynolds v. Atlantic Coast Line R. Co.*, 336 U. S. 207, (1949), where this Court upheld a ruling as a matter of law adverse to Petitioner's contention. In so doing it observed:

> "It appears from the complaint that the petitioner's husband was a brakeman whose duties customarily required him to cross between cars on moving freight trains. On one such crossing he fell and was killed. This crossing occurred as part of a required journey from the caboose to a car from which a signal was to be given. The signal ordinarily would have been given from the sixth car from the caboose. The complaint charged, however, that because the railroad had negligently allowed canes to grow alongside the roadbed the deceased could not safely signal from the sixth car and so had to cross to the seventh in order to give the required signal. On this additional crossing he was killed. The complaint also charged that the deceased would not have had to make this particular journey at all if the railroad had provided a competent assistand brakeman. Neither the journey nor the crossing on which the accident occurred was alleged to be any more hazardous than that usually undertaken by railroad brakemen."
>
> 336 U. S. 207, 208 (1949)

Petitioner's evidence in regard to the number and qualifications of the brakemen was not only insufficient to

justify a conclusion of causal connection between these factors and Petitioner's fall, but also presented no facts from which a reasonable inference of negligence could be drawn. No reason has been suggested for Respondent to foresee an unreasonable risk of injury to Petitioner from the creation by it of a situation requiring Petitioner to be on top of box cars, an ordinary and customary position for Petitioner during all his years of work.

Time Limitation:

Petitioner's further theory that an alleged time limitation played a part in Petitioner's injury was precluded by his own testimony as well as that of his witnesses which disclosed that the supposed limit did not touch upon the cause of his fall and indeed that no such time limit existed. Petitioner's own testimony descriptive of his conduct preliminary to and at the moment of his fall revealed that he had walked along the tops of nine box cars and, still walking, came to the end of the box car from which he fell next adjoining an open gondola car. In order to pass the gondola he attempted to descend a ladder on the box car. In starting to climb down he had placed both hands on the top round and both feet on the second round from the top, and was then, according to his own emphatic statement, in a *normal customary position in using that type of ladder.* Then his feet slipped and he fell. There was no evidence that he was hurrying, nor that he was unable to take any safety precautions. Indeed, under his testimony he did take the normal precautions by assuming a perfectly proper hold on the ladder in a perfectly normal position. Notwithstanding such theoretical explanations as his counsel may now have offered in his brief, the only explanation for his fall which Petitioner himself could offer was that he might have had grease on his shoe. If Petitioner did in fact

do any rushing on the job, under his testimony it must have been at other times and places than in the course of performance of the very act in which he was engaged at the moment of his fall. However and whenever this might have been, it did not cause him to get grease on his shoe, if he had any, or to fall in the course of descending a sound ladder in a normal and customary manner. Where a plaintiff in an action under this Act by his own testimony has precluded the theory of recovery upon which he relies, the case in properly withheld from the jury. *Herdman v. Pennsylvania R. Co.*, 352 U. S. 518, (1957).

Petitioner's evidence further disclosed that under no reasonable interpretation of the same could Petitioner's instructions be said to have constituted a time limit requiring him to perform his work in a hazardous manner. He simply was told on his first day on the job to line up the cars for Ford Motor Company while they were at lunch, and he ascertained that the lunch period lasted thirty minutes. He thereafter worked the job regularly for more than a month before his fall. It was undisputed that the time required to complete the work varied from day to day depending up the day's switch order. Sometimes it was completed during the lunch period and sometimes not. When it was not, overtime was involved and the extra wages paid. There was no recrimination. The conductors in charge of the operation had authoritative control over the pace at which the work was done and knew and understood that they were never required by this instruction to do more than they could in safety. Petitioner's switch order for the day of his injury was one which showed on its face could not be done within less than estimates ranging upward from fifty minutes. Petitioner himself knew and admitted in his testimony that such circumstances relieved him of any obligations based on the prior oral instruction

to do the work within the lunch hour. Indeed, he testified that he knew that his duty under such circumstances was to take more time rather than abandon safety precautions.

> "Q. . . . And if you reach a point where it is necessary to abandon safety in order to do a certain thing by a certain time, you just have to go slower, don't you?
>
> A. Yes, sir." (R. 22)

Now on this review Petitioner's counsel seeks recovery on the reverse proposition that Petitioner faced with such circumstances was required to abandon safety for the sake of saving a little time. Petitioner's counsel has found himself once more relying upon a theory which his own evidence has precluded. The controlling principle of the *Herdman* case, stated above, also eliminates this theory of Petitioner from submission to a jury, for his evidence has disproved the existence of the alleged company requirement upon which his argument rests.

Condition of Right of Way:

As to the condition of the right of way in reference to Petitioner's claim that this too contributed to his injury, it is perhaps too obvious to deserve mention that Petitioner's fall was wholly unrelated thereto. Counsel for Petitioner has referred to authorities dealing with a railroad company's duty in respect to its employees walking upon and normally stepping to and from the right of way. These might have some bearing in cases involving those facts, but of course have no pertinency at all to this review. On this point it is sufficient to note that Petitioner's expert medical evidence disclosed that once having fallen from the ladder Petitioner was in all probability destined to suffer a fracture

upon hitting the ground, and that the slope of the ground probably saved him from a more serious injury of the type generally incurred in straight falls to a level surface.

No Liability In This Action for Acts of Physician:

Whether or not an individual was an employee of a railroad within the meaning of the Federal Employers' Liability Act is a question which has been before this Court on numerous occasions in the past, and the governing principles are settled. In *Robinson v. Baltimore & O. R. Co.*, 237 U. S. 84 (1915) this Court stated:

> "We are of the opinion that Congress used the words 'employee' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employee."
>
> 237 U. S. 84, 94 (1915)

While many elements enter into the consideration of the question in any particular case the over-all factor ultimately determinative of each case is the right, not only of judgment over results, but of detailed control over the actions of the individual. *Chicago, R. I. & P. R. Co. v. Bond*, 240 U. S. 449 (1916); *Linstead v. Chesapeake & O. R. Co.*, 276 U. S. 28 (1928); *Hull v. Philadelphia & R. R. Co.*, 252 U. S. 475 (1920); *Robinson v. Baltimore & Ohio R. Co.*, 237 U. S. 84 (1915). Any careful consideration of the facts of a particular case to determine the existence or not of "the conventional relation of employer and employee" necessarily involves a reference or perhaps the leading case on this point, *Standard Oil Co. v. Anderson*, 212 U. S. 215 (1909), from which the following exerpt is taken:

> "It sometimes happens that one wishes a certain work to be done for his benefit, and neither has persons in his employ who can do it nor is willing

> to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work, and places them under his exclusive control in the performance of it, those men become *pro hac vice* the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work, and they are, for the time, his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still, in its doing, his own work. To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed,—a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking."
>
> 212 U. S. 215, 221-222, 483-484 (1909)

The test is similar in determining the applicability in any case of the doctrine of respondeat superior where the result depends upon the individual's status as an agent or an independent contractor. The Restatement, Agency, Section 250 *Comment* a., as follows, summarizes the controlling principle:

"*Comment:*

a. A principal employing another to achieve a result but not controlling nor having the right to control the details of his physical movements is not responsible for incidental negligence while such person is conducting the authorized transaction. . . . It is only when to the relationship of principal and agent there is added that right to control physical details as to the manner of performance which is characteristic of the relationship of master and servant, that the person in whose service the act is done becomes subject to liability for the physical conduct of the actor."

The doctrine is also applicable in the instance of the independent contractor's performing some act for the principal in the performance of which the principal owes to another the non-delegable duty of the exercise of due care. Restatement, Agency, Section 251.

In the disposition of cases under this Act these have been the governing principles as well as in other cases. *Baker v. Texas & Pacific R. Co.*, 359 U. S. 227 (1959); *Del Vecchio v. Pennsylvania Railroad Company*, 233 F. (2d) 2 (C. A. 3rd, 1956), cert. denied 352 U. S. 909. The only exception recognized by this Court to the above principles, not applicable here, is pronounced in *Sinkler v. Missouri P. R. Co.*, 356 U. S. 326 (1958), holding that an independent contractor engaged in the furtherance of the actual operational activities of a railroad company, such as yard switching, is an agent of the company within the meaning of the Act.

The traditional test of a jury question on these issues has been re-approved in this Court's most recent decision

on this subject, *Baker v. Texas & Pacific R. Co.*, 359 U. S. 227 (1959) to the effect that no jury issue is made out if reasonable men could not reach differing conclusions.

In the case at bar Dr. Leigh was by every test the classical example of the true independent contractor for whose negligence the Respondent would not be liable. There is not a scintilla of evidence of any right of the Respondent to control his acts, his treatment or his judgment. All the material evidence is to the contrary. He was in all respects a private practitioner called in by the railroad to treat an employee at the company's expense, the only modification being that the cumbersome burden of payment for each individual service had been alleviated by an arrangement for a regular monthly stipend of $125. Under these facts no reasonable man could conclude that Respondent had the right of detailed control over the diagnosis, treatment and judgment rendered by Dr. Leigh, and the foregoing principles apply as they did in *Metzger v. Western Maryland Ry. Co.*, 30 F. (2d) 50 (C. C. A. 4th, 1929) where it was stated:

> "And we think also, that defendant is not liable under the statute for the negligence of the physician, for the reason that the physician is not an 'officer, agent or employee,' for whose negligence the company is made liable. He is obviously not an officer or agent; but, as he is employed by the company to treat its employees, the question arises whether such employment does not constitute him an employee. We think not. The word 'employee' is used in the statute to designate one within the relationship of master and servant, one whose work is subject to the order and control of the company, not an independent contractor or a physician, who exercises his own judgment free from the company's

> control or supervision. *C.R.I. & P.R. Co.* v. *Bond*, 240 U. S. 449, 36 S. Ct. 403, 60 L. Ed. 735, and see *Quinn* v. *Kansas, etc. R. Co.*, 94 Tenn. 713, 30 S.W. 1036, 28 L.R.A. 552, 45 Am. St. Rept. 767; *Union Pac. R. Co.* v. *Artist* (C.C.A. 8th) 60 F. 365; *Pearl* v. *West End Street Ry. Co.*, 176 Mass. 177, 57 N.E. 339, 49 L.R.A. 826, 79 Am. St. Rep. 302 (opinion by Holmes, C.J.); *Powers* v. *Mass Hom. Hospital*, (C.C.A. 1st) 109 F. 294, 298 (65 L.R.A. 372); *Ill. Cent. R. Co.* v. *Moodie*, (C.C.A. 5th) 23 F (2d) 902."
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> 30 F. (2d) 50, 51

In this conclusion, Respondent does not mean to suggest any impossibility of the existence of circumstances in other case requiring the application of the doctrine of respondeat superior where a physician is involved. Respondent does not argue with this Court's ruling in the case of *DeZon* v. *American President Lines*, 318 U. S. 660 (1943) where under its facts the ship's doctor was found as a matter of law to be an employee. As stated on page 668, he was "not in his own or the seaman's control; he was an employee and as such subject to the ship discipline and the master's orders". Furthermore, that physician in treating the seaman was, as this Court emphasized, engaged in the shipowner's business and discharging the ship's absolute duty "to provide proper medical treatment and attendance for seamen falling ill or suffering injury in the service of the ship". (page 667). There exists no such duty upon a railroad company. *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367 (1932); *Lanni* v. *Wyer*, 219 F. (2d) 701 (C. A. 2nd, 1955). In addition, the Court pointedly called attention to the fact that the physician "was not an independent practitioner, called to treat one whose expenses the ship agreed to make good", (Page 668), which, except for the method of payment, precisely defines the position of Dr. Leigh in the case at bar.

This Court on this review need not be concerned with other cases cited by Petitioner which are illustrative of circumstances justifying the conclusion that the physicians there involved were subject to the detailed control of their companies. Their facts are so foreign to the case at bar as to be of no usefulness here. Typical among them is the district court decision *O'Donnell v. Penna. Ry. Co.*, 122 F. Supp. 899 (S. D. N. Y., 1954) where the facts were that:

> "The railroad maintained a complete medical staff including supervisory personnel. There was testimony that the doctor took general orders or instructions from superiors, that his superior might make recommendations or suggestions about medical treatment, and that if his superior saw him using poor medical technique he would take exception or ask him to stop. In other respects, there can be no doubt that the physician was an employee of the railroad. He had a social security number, a service record, a wage record disclosing the regular payment of periodic wages, and he worked regular hours. The plaintiff did not select the doctor himself; he was instructed to consult him, over his own objection."
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> 122 F. Supp. 899, 902.

In the case at bar Petitioner was free to choose his own doctor if he so desired and this he did after his initial treatment at his company's expense. The railroad did not maintain any medical staff. Dr. Leigh took no orders from any railroad personnel nor did the railroad exercise any control over his treatment of patients. He had no social security, withholding tax or railroad retirement arrangements with the company. He kept his own hours; maintained his own private practice in his own office with his own employees and equipment, none of which was furn-

ished or in any manner confrolled by the company. The lower court was clearly right in holding as a matter of law that the railroad was not liable for any acts of Dr. Leigh.

No Evidence of Negligence of Physician:

The crux of Petitioner's claim for alleged malpractice is that the physician of unquestioned qualifications engaged by Respondent treated and advised Petitioner in accordance with his medical judgment that strapping and light use of the foot constituted the best treatment. Having so treated Petitioner from July 3, 1957, the date of his injury, to July 20, 1957, the physician advised Respondent, upon inquiry, that he felt Petitioner could do light work not involving climbing cars. Petitioner returned to work for a week. His foot continued hurting, so he consulted his own physician, Dr. Thiemeyer. There was no evidence that this physician did anything more to Petitioner's foot than did Dr. Leigh, but his advice differed in that he instructed Petitioner not to use the foot. Petitioner's foot was sufficiently healed for him to return to regular work on September 1, 1957.

On the testmony of his physician that "It is my opinion that a fracture should be immobilized . . ." (R. 29), and that "I would say . . ." that early ambulation would aggravate the injury and retard healing (R. 29), Petitioner seeks a recovery for negligence on the part of Dr. Leigh. In this theory, Petitioner's counsel overlooks the fact that he has not offered any proof that Dr. Leigh's judgment in this respect was in error, nor that such judgment, even if erroneous, was negligent. In the first place, one does not prove error by mere proof of conflicting medical opinon, and neither court nor jury can properly attempt to determine in the absence of evidence that either theory is not

founded on sound medical knowledge nor that either theory is rejected among average competent practitioners in that community. *Baldor v. Rogers*, (Fla.) 81 So. (2d) 658, 55 ALR (2d) 453 (1955). Even more obvious is the point that even if Dr. Leigh's judgment is assumed to be erroneous, this fact does not constitute any evidence of negligence. The rule is fundamental, and is stated as follows in 41 Am. Jur., Physicians and Surgeons, Section 103:

> "If a physician brings to his patient care, skill, and knowledge, he is not liable to him for damages resulting from a bona fide error of judgment of which he may be guilty. The law requires a physician to base any professional decision he may make on skill and careful study and consideration of the case, but when the decision depends on an exercise of judgment, the law requires only that the judgment be bona fide. A physician is not an insurer of the correctness of his judgment. Especially is this true in cases of doubt or where competent medical authority is divided, and the physician in question follows a course of treatment advocated by a substantial number of competent physicians in good standing in his community."

As this Court stated in *DeZon v. American President Lines*, 318 U. S. 660, 671 (1943), the mere fact that a doctor made a wrong diagnosis does not prove that it was a negligent one, and (page 672) it is not this Court's function to read "into the law a theory, however disguised, that a physician who undertakes care guarantees cure, and that each unsuccessful effort of the physician may be visited with a successful malpractice suit."

To support a verdict there must be expert medical testimony that the physician failed to possess or exercise that degree of diligence and skill which is common to and exercised by the average member of the profession in good standing in similar localities in the same general line of practice. *Henley v. Mason*, 154 Va. 381, 153 S. E. 653 (1930). There was a total absence of such evidence in the case at bar. For this reason also the trial court was compelled to strike the evidence of Petitioner on this count.

CONCLUSION

Respondent respectfully submits that the trial court was plainly right in striking Petitioner's evidence and entering summary judgment for Respondent on the grounds that there was no evidence of any negligence on the part of Respondent or imputable to it which caused or contributed to Petitioner's fall and resulting injury. The judgment should be affirmed.

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